

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

No. 76-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK,

Petitioner,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 76-4085

On Petition for Review
of Orders of the
Interstate Commerce Commission

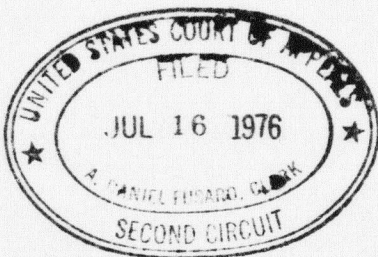
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July 12, 1976

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Preliminary Statement

Commonwealth of Pennsylvania, and Pennsylvania Public Utility Commission, intervenors, jointly submit this Brief in support of the validity of orders of the Interstate Commerce Commission ("I.C.C.").

The initial decision in the agency proceeding was entered by Division 2 of the I.C.C. on June 18, 1974 (served July 18), Unit Train Rates on Wheat, 346 I.C.C. 814. Division 2 found reduced ~~rates~~^{1/} rates from Duluth, Minn.-Superior, Wis. ("Twin Ports") to Martins Creek, Pa. during the season of open navigation on the Great Lakes to be just and reasonable and not otherwise unlawful, but that the same rate from Minneapolis, Minnesota Transfer, and St. Paul, Minn. ("Twin Cities") to Martins Creek, Pa. would prefer

1/ 72.25 cents per 100 pounds.

the Twin Cities and prejudice the Twin Ports. Reduced rates were approved from both Twin Cities and Twin Ports to Martins Creek, Pa. to apply during the period of closed navigation on the Great Lakes.^{2/}

After this initial decision by Division 2, State of New York sought to intervene in the proceeding, and its intervention was on August 14, 1974 (served August 15) granted by the I.C.C. New York filed its petition for reconsideration on October 2, 1974. New York did not seek to change the "closed navigation" rate, but desired to upset the "open navigation" rate from Twin Ports to Martins Creek, Pa. which had been approved by Division 2.

Commonwealth of Pennsylvania thereupon itself petitioned for leave to intervene, and tendered a reply to New York's petition for reconsideration, both filed October 22, 1974.

Pennsylvania's intervention was granted June 27, 1975 (served August 5), in the same order which denied New York's petition for reconsideration of the Twin Ports "open navigation" rate. However, Division 2 in that order granted petitions for reconsideration by the railroad respondents and by others for further consideration of the Twin Cities "open navigation" rate to Martins Creek, Pa. The action of Division 2 was in its capacity as an Appellate Division.

Finally, Division 2 issued its further report, dated January 27, 1976 (served February 11), which approved the rate parity of Twin Cities with Twin Ports, as initially published by the respondent railroads, and which had been disallowed as to Twin Cities in the initial decision.^{3/} 351 I.C.C. 470.

^{2/} The rate is 88 cents per 100 pounds from Twin Cities and Twin Ports.

^{3/} Commissioner Hardin had dissented on this ground. 346 I.C.C. at 856.

Interest of Pennsylvania

It is the position of Pennsylvania that the proposed rail rate on wheat during the "open navigation" season from Twin Ports and from Twin Cities to Martins Creek, Pa. is just and reasonable and not otherwise unlawful.

A milling concern, ConAgra Incorporated, has located at Martins Creek. The reduced rail rates are necessary if Pennsylvania is to attract this type of industry. Mills at Buffalo, N.Y. have enjoyed a commanding position for many years, and the dominance of Buffalo still prevails today.

This judicial review proceeding is akin to the attempt of the Buffalo interests to prevent reduced rail rates on flour from Pittsburgh, Pa. The I.C.C.'s decision in that case approving the rail adjustment in most respects, was sustained by the reviewing court. Grain, Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (1964) and 325 I.C.C. 669 (1965), sustained in State of New York v. United States, 256 F. Supp. 634 (W.D.N.Y. 1966), aff'd 386 U.S. 349 (1967).

A similar result is warranted here.

JURISDICTION

New York's Petition for Review, insofar as it seeks to review the Twin Ports rate approved in the earlier report, and sustained August 5, 1975 by Division 2, Acting as an Appellate Division, should be dismissed for want of jurisdiction as untimely. Our reasons may differ somewhat from those urged by the other intervenors. We were active in Microwave Communications, Inc. v. F.C.C., 515 F. 2d 385 (D.C. Cir. 1974), and view that decision as meaning a petition for reconsideration of the F.C.C.'s decision tolls the 60-

day period of 28 U.S.C. 2344 until 60 days following service of the agency's order denying reconsideration. However, there is no specific statutory provisions regarding a time period by which review of an I.C.C. order is tolled by a petition for reconsideration comparable to the provisions in 47 U.S.C. 402(a), 405^{4/}, governing the F.C.C.

That part of the June 18, 1974 (served July 18) report and order which sustained the Twin Ports rail rate became reviewable when Division 2, acting as an Appellate Division, denied reconsideration of that part of report on June 27, 1975 (served August 5). To be sure, the same reconsideration order also reopened the proceeding with respect to the Twin Cities rate; however, the the express statutory terms which do govern judicial review of I.C.C. orders provide for review of "part" of an order. 28 U.S.C. 2321; 2342(5). Accordingly, a petition for review should have been filed within 60 days from August 5, 197~~5~~⁵, for the Twin Ports rate.

Finally, we do not believe the June 27, 1975 (served August 5) order, insofar as it denied reconsideration, can be judicially review at all. The court in Microwave Communications, Inc. v. F.C.C., supra, pointed out at p. 385, fn. 7:

"It has long been settled that an order which merely denies rehearing of another order is not itself reviewable."

THE COMMISSION DID NOT ERR
IN ITS APPROVAL OF THE RATES

New York's petition for reconsideration, filed October 2, 1974, insofar as it was involved with rate relationships, was concerned solely with the contention that the 43-cents per 100

^{4/} Cf. 49 U.S.C. 17(10); 5 U.S.C. 704. See also: 15 U.S.C. 717(r).

pounds rate from the Twin Ports to Buffalo is out of line with the 72.25-cents rate from the Twin Ports to Martins Creek, creating preference to Martins Creek and prejudice to Buffalo.

Pennsylvania answered that the 43-cents rate was still on a lower level than the 72.25-cents rate, yet the distance was greater under the latter rate. The all-water competition sought to be met by the 43-cents rate during the "closed navigation is dissimilar to the water-rail or water-truck competition sought to be met by the 72.25-cents rate. Moreover, New York's request for an alternative order did not satisfy the "control" test because Soo Line and Erie cannot control the 43-cents rate. New York Central Railroad Co. v. United States, 207 F. Supp. 483, 489-90 (S.D.N.Y. 1962).

Although New York renews this section 3(1) argument at length (NYS Br., pp. 21-25), it now advances two new propositions. First, it urges, also under section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), that the 40-cents per 100 pounds rate on wheat from Buffalo to Martins Creek is improperly related to the 72.25-cents per 100 pounds rate from Twin Ports/Twin Cities to Martins Creek. (NYS Br., pp. 19-21). However, the Commission rejected this argument for failure of proof. 346 I.C.C. at 849-51. The lake carriers simply did not demonstrate that destructive competition, in violation of the national transportation policy, was involved.

New York's second new argument is the contention that section 3(4) of the Interstate Commerce Act was violated by reference to Erie's 47-cents per 100 pounds division of the Twin Ports/Twin Cities rate vis-a-vis Erie's rate of 40-cents per 100 pounds for moving wheat from Buffalo to Martins Creek. (NYS Br., pp. 12-19).

The short answer to this claim is in the text of the Commission's report, 346 I.C.C. at 852, to the effect that two different lines of Erie are involved. They do not connect at Buffalo. Erie's line from Chicago, Ill. to Martins Creek, Pa. does not pass near Buffalo.

CONCLUSION

The Court should dismiss the petition for review with regard to the Twin Ports rate approved in the first report; the Court should affirm the I.C.C.'s decision with regard to the Twin Cities rates approved in the second report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served 2 copies of BRIEF
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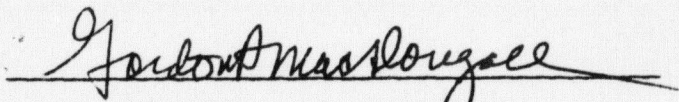
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